IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10217 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL
and
Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BHILWARA TELENT SERVICES PRIVATE LIMITED

Versus

UNION OF INDIA

Appearance:

Mr.Rakesh Gupta, with Mr.Uday Joshi, for
M/S TRIVEDI & GUPTA for Petitioners

Mr.Ashim J. Pandya, for Mr.Akshay Mehta, for Respondent No. 1

MR MUKESH R SHAH for Respondent No. 2, 3

CORAM : MR.JUSTICE B.C.PATEL
and
MR.JUSTICE P.B.MAJMUDAR

Date of decision: 29/06/2000

ORAL JUDGEMENT: (Per B.C. Patel, J.)

1. Petitioner No.1 is a Company registered under the Companies Act. Show cause notice dated 27.4.1999 as well as Trade Notice No.94/99 dated 14.10.1999 are the subject matter of this petition. Commissioner of Central Excise and Customs, Vadodara, took the view that the public Mobile Radio Trunk Service carries out the function of telephone and hence, is covered under the service tax and, therefore, liable to be taxed as such. It is contended before us by the petitioners that the Trade Notice is without any authority of law, arbitrary and illegal and is issued only by the respondent No.2; excepting that none in the country has developed the idea of describing P.M.R.T. Service as an instrument of telephone.

2. It appears that on 14.10.1999, the Commissioner, Central Excise and Customs, Vadodara, issued Trade Notice No.94/99, vide Annexure `G'. It is stated that he has examined, in detail, the matter regarding payment of service tax of Public Mobile Radio Trunk Service. According to the opinion of the Commissioner, in common parlance, `telephone' is understood to mean as :-

> "... an instrument for transmission of speech to a desired person beyond the limits of ordinary audibility" ...."

In the Trade Notice, it is further mentioned that a "telephone connection" would mean :-

> "... connecting two telephone apparatus so as to enable a caller to avail the speech transmission facility to a desired person ...."
>
> (emphasis supplied)

Commissioner, relying on the decision of the Karnataka High Court in N. Krishnadevaraya v. Union of India, AIR 1996 Karnataka 189, and Law Lexicon, arrived at a conclusion that the instrument is carrying out the function, which a telephone is carrying out. It is in view of this, the Commissioner clarified that the said services would be covered under the Service Tax net and hence, the providers under the jurisdiction of Baroda Commissionerate would be held liable to pay the service tax. It is this Trade Notice, which is the subject matter of this petition.

3. So far as the agreement is concerned, Mr.Pandya, learned counsel appearing for the respondent, when faced with the situation was not a position to state positively that the instrument can be used as a telephone. As a matter of fact, Condition Nos.4.1 and 4.2, which are relevant, read as under :-

> "... Interconnection with Network operated by DOT, MTNL and other networks.
>
> 4.1 The interface to PSTN (Public Switched Telcom Network) is not permitted.
>
> 4.2 No interconnection among two separately licensed applicable systems is permissible ... "

Thus, under this service, if an agreement is executed, then person can have a contact with only two or three or four persons as mentioned in the agreement and not with an outsider. It is a one-way contact at a time. Reading the prohibition clause in the agreement itself, the instrument cannot be used as a telephone. If licences are given to `A' and `B' separately, `A' can have contact with the persons concerned under the agreement, but he cannot have interconnection with `B', though `B' is a person authorised to operate the system. Thus, it cannot be used as a telephone even between two separate licence holders.

Chapter V of the Finance Act, 1994 refers to service tax. Definition is given in Clause 65 which reads as under :-

> "...65. Definitions.
>
> In this Chapter, unless the context otherwise requires.-
>
> ... ...
> (41) "service tax" means tax leviable under the provisions of this Chapter ...."

So far as telephone is concerned, it is required to have a look at sub-clauses (47) and (48), which are as under :-

> "... (47) "Subscriber" means a person

to whom a telephone connection or a pager has been provided by the telegraph authority;

(48) taxable service means any service provided.-

(a) ... ...

(b) to a subscriber, by the telegraph authority in relation to a telephone connection;

(c) to a subscriber, by the telegraph authority in relation to a pager;

... ..."

Thus, service must be provided to a subscriber by the telephone department in relation to a telephone connection. Earlier, pager was not included and, therefore, it was not possible for the Revenue to levy the tax. However, by definition clause 65(47)(c), it is specifically included and that is how the pager is subjected to a service tax. Unless it is specifically included, the Commissioner, under the shelter of a Trade Notice, cannot call upon the assessee to pay the tax. It is required to be noted that on number of occasions, the Apex Court has pointed out that the question of taxing statute is to be strictly interpreted. It is not open to draw the inferences for the purpose of collection of tax. The meaning may be different in ordinary parlance and the Legislature might have contemplated altogether a different meaning than what is understood in a common parlance and it is that item, which is indicated by the Legislature that will have to be considered to levy a tax and not understood in an ordinary parlance. It is required to be noted that the instrument, even in common parlance, is not understood as a telephone. It is used as a wireless and wireless is not subject to tax. Part 12 of the Constitution refers to Finance, Property, Contracts and Suits. Article 265 reads as under :-

"265. Taxes not to be imposed save by authority of law.- No tax shall be levied or collected except by authority of law."

If the Revenue wants to levy a tax, it must show that under the law, it is authorised to levy and collect the tax. Again, one must be clear that the tax levied or collected should not be contrary to law.

4. We are of the view that once it is specifically prohibited to make the use of an instrument as a telephone, merely because there is possibility that the same can be used as a telephone, tax cannot be levied and, therefore, the Commissioner has erred in not considering the specific provision governing the relations between the parties. If he would have considered this, he would have definitely come to a conclusion that the same cannot be taxed.

5. In view of what is stated hereinabove, the show cause notice as well as the trade notice are hereby quashed and set aside. Rule is made absolute. No costs.

29th June, 2000 (B.C. Patel, J.)

(P.B. Majmudar, J.)

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(apj)